submitted to the Commission,[12] that: "tribal revenues were not part of the tribal economic picture when Congress enacted the SBA tribal exception to the affiliation rule in 1970"[13]; "the Indian Gaming Regulatory Act provides certain Indian tribes with a non-traditional source of revenue that could be very substantial"[14]; and "gaming revenues are not subject to the same types of legal and governmental controls as other revenues received by Indian tribes, and therefore are more analogous to the revenues of non-Indian entities."[15]

There are several reasons why the Commission's assertions are inaccurate. First, the tribal exception to the SBA's affiliation rules was passed in 1990 (not 1970), two years after the passage of the Indian Gaming Regulatory Act, which was passed to regulate gaming on Indian lands. This proves that the Commission's belief that Congress was not cognizant of gaming revenues when it passed the SBA tribal exemption is factually wrong.

The significance of the second distinction regarding the "untraditional" nature of gaming revenue, is unclear (even aside from the obvious question of what a "traditional" source of revenue would be for an Indian tribe), since most sources of revenue that will be used by Indian tribes and Alaska Native Corporations to participate in the PCS auctions will come from equally

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[12] No copies of the documents cited in the Fifth MO&O, notes 103-106, as "Cook Inlet *ex parte* comments, filed October 31, 1994" have been able to be located despite searches of the record by representatives of the Oneida Tribe, the FCC's duplicating contractor, ITS, or the Commission staff, pursuant to a FOIA request submitted on behalf of the Oneida Tribe.

[13] See Fifth MO&O, ¶44, citing *ex parte* comments referenced in note 11, supra. The Commission wrongly inferred that the aforesaid SBA exception could not have been meant to apply to gaming revenue because such revenue was throught not to be in the picture at the time the exception was created by Congress.

[14] Fifth MO&O, ¶44, citing the *ex parte* comments referenced in note 12, supra.

[15] Id.

"untraditional" sources, including, e.g., wireless radio and broadcasting. Likewise, the potential of gaming activities to generate "substantial" revenue for some tribes but not others is beside the point: tribes are not required to be on a level playing field in every respect in order to be entitled to their rights, derived from their unique status as accorded by congressional mandates. Many tribes enjoy substantial revenues from petroleum and natural gas development, others from operation of ski resorts, which revenues are available solely because of chance of location of reservations. The Oneidas and many other tribes have no such geographic advantages, and do not begrudge those advantages to the tribes that are positioned to exploit them. The fact that the Oneida Tribe is not so positioned means that it must access business revenue where it can: gaming. The matter is, however, irrelevant as regards the congressional mandate. Neither § 636(j)(10)(J)(ii)(11), nor any other portion of the Small Business Act, nor the legislative history thereto, nor the SBA itself, makes any determination whatsoever with regard to sources of revenues.

Finally, as regards the types of legal and governmental controls on gaming revenues vis-a-vis revenues from other sources, no rational basis exists to differentiate between gaming revenues and revenues from the previously cited sources (petroleum, natural gas, timber and ski resorts) all of which are available to Indian tribes and Alaska Native Corporations for PCS bidding and development. Like any other tribe or Alaska Native Corporation, the primary mission of the Oneida Tribe in its business activities is to improve the social and economic position of the tribal members. The Oneida Tribe, like others, puts an inordinately high portion of its business income into distribution to members. The Oneida Tribe also supports, from its business income, social programs providing services ranging from health care and job training to cultural heritage and

education projects. These various distributions and uses pose substantial limitations on the Oneida Tribe's ability to utilize that income for investment. In fact, the Oneida Tribe suffers the same constraints as any other tribe or Alaska Native Corporation, even in its receipt of gaming revenues. It cannot, for example, issue debt or equity securities, or pledge real or personal property as security for loans.

The Commission has an obligation to generate rules that accord with other Federal law, which obligation the Commission recognized when it asserted "that Congress has mandated that the SBA determine the size of a business concern owned by a tribe without regard to the concern's affiliation with the Indian tribe"[16] and that "[o]ur policy mirrors this congressional mandate."[17] Federal agencies are under a duty to determine whether their rules might conflict with other Federal policies and whether such conflict can be minimized.[18] These affiliation rules clearly deviate from those mandated by Congress and employed by the SBA. 15 U.S.C. §632(a)(2) sets forth a requirement that Federal agencies, in adopting size standards for qualification of businesses for Federal programs, either adopt the standards of the SBA or obtain the approval of the Administrator of the SBA for their own standards. Although the Commission purports to adopt the SBA's standards, it is clear that the SBA does not apply the "unfair competitive advantage" provision of §636(j)(10)(J)(ii)(11) as the Commission appears to intend. The Commission's standards are, therefore, inconsistent with Federal policy. In fact, as has been

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[16] Fifth MO&O, ¶43, citing Order on Reconsideration, ¶4.

[17] Id.

[18] LaRose v. FCC, 494 F.2d 1145, 1146, n. 2 (D.C. Cir. 1974).

demonstrated, the Commission's current policy does not accord with the Federal law upon which it is modeled.

Conclusion.

It is noteworthy that the Indian tribal revenue affiliation rule set forth in §636(j)(10)(J)(ii)(11) applies to the tribal entity itself and not to individual persons, whereas affirmative action preferences apply to individuals. It is, in this analysis, an exemption applicable to sovereign entities, based on their status as such. Native Americans could, at least prior to Adarand, apply for preferences based on their individual status as members of a minority group, but could not themselves qualify for special treatment under §636(j)(10)(J)(ii)(11). This fact illustrates the special relationship of the Indian tribes to the Federal government. It is clear that, whatever the effect of Adarand on preferences for individuals, based on their status as members of a minority, the special treatment accorded to the tribal entities is unaffected.

The Adarand decision nevertheless compels the dropping of the gaming revenue exclusions because it means that Native Americans will not be able to participate as individuals, and that the meaningful participation of many Native Americans (particularly the members of the Oneida Tribe, who suffer from an unemployment rate twice the national average) will now have to occur solely through the participation of their tribes. This fact necessitates that the Commission bring its policies into accord with other Federal policies, since that will be the only way to give all Native Americans the opportunity to participate. The Commission's current policies are inconsistent with (indeed, at odds with) Federal law, and do not mirror it, as the Commission intended. The Oneida Tribe requests that the Commission consider revamping its policies to

bring them more into line with established Federal law, which will afford to all Native Americans the opportunity to participate in a meaningful way in the PCS auctions.

The Oneida Tribe, therefore, submits that the Adarand decision has no effect on the Oneida Tribe's opportunities to bid in the entrepreneurs' block, as is further documented by the attached Memorandum of Law.

MEMORANDUM OF LAW

RE: Attorney's Opinion: FCC Rules and Regulations regarding designated entities in light of Adarand Construction, Inc. v. Pena, 1995 WL 347345 (U.S.).

In Adarand, the Supreme Court held that federal programs that award benefits on the basis of race must be strictly scrutinized in an equal protection analysis. This holding expanded the Court's previous decision in City of Richmond v. Croson Company, 488 U.S. 469 (1989), in which the Court found that state and local affirmative actions programs must be subject to strict judicial scrutiny. The question to be answered now is how this holding in Adarand affects the current federal programs that contain preferences based on race.

The Oneida Tribe of Indians of Wisconsin argue that the Adarand decision should have no effect on the Tribe's opportunities for bidding in the "entrepreneurs' block" licenses in the 2 GHz band Personal Communications Service, pursuant to the Communications Act of 1934.

I. Adarand Construction, Inc. v. Pena only applies to challenged federal statutes

As the Supreme Court states in Adarand, "[u]nless Congress clearly articulates the need and basis for a racial classification, and also tailors the classification to its justification, the Court should not uphold this kind of statute." 1995 WL 347345 *17 (U.S.). This holding contemplates a legal challenge to a federal statute on equal protection grounds. For example, in Adarand, a similarly situated contractor that had been adversely affected by the Small Business Act filed a claim asserting that the Act was a violation of the Equal Protection Clause. Id. at *6. The Small Business Act establishes the "Government-wide goal for participation by small business concerns owned and controlled by socially and economically disadvantaged individuals" at "not less than

5 percent of the total value of all prime contract and subcontract awards for each fiscal year." 15 U.S.C. s 644(g)(1). The Court did not find that the Small Business Act was unconstitutional because of its race-based preferences. Rather, the Court merely found that the Court of Appeals had not applied the correct level of scrutiny. Adarand, 1995 WL 347345 at *22. "The Question whether any of the ways in which the Government uses subcontractor compensation clauses can survive strict scrutiny, and any relevance distinctions such as these may have to that question, should be addressed in the first instance by the lower courts." Id.

There has been no such challenge of the Communications Act (47 U.S.C. 309(j)), in which Congress mandates that the FCC should "ensure that small businesses, rural telephone companies, and businesses owned by members of minority groups and women are given an opportunity to participate in the provision of spectrum-based services." 47 U.S.C. 309(j)(4)(D). Adarand does not require that all federal race-based preference statutes are unconstitutional, but merely that, once challenged, a court must assess such statutes under a strict level of scrutiny. As the Court states,

> . . .whenever the government treats any person unequally because of his or her race, that person has suffered an injury that falls squarely within the language and spirit of the Constitution's guarantee of equal protection. It says nothing about the ultimate validity of any particular law; that determination is the job of the court applying strict scrutiny. The application of strict scrutiny, in turn, determines whether a compelling governmental interest justifies the infliction of that injury.

Adarand, 1995 WL 347345 at *17.

2. **The Communications Act of 1934 is not a race-based preference statute.**

The Small Business Act, addressed in Adarand, contains a "race-based rebuttable presumption." Id. at *8. The presumption states that:

> [t]he contractor shall presume that socially and economically disadvantaged individuals including Black Americans, Hispanic Americans, Native Americans, Asian Pacific Americans, and other minorities, or any other individuals found to be disadvantaged by the Administration pursuant to section 8(a) of the Small Business Act."

15 U.S.C. ss 637(d)(2),(3). The Act then goes on to provide monetary incentives to contractors who subcontract to small businesses controlled by socially and economically disadvantaged individuals. Adarand, 1995 WL 347345 at *4. In effect, the Small Business Act creates a quota for minority participation in the subcontracting industry. As the Court notes, to survive strict scrutiny, the statute in question must consider "the use of race-neutral means to increase minority business participation. . . or whether the program was appropriately limited such that it will not last longer than the discriminatory effects it is designed to eliminate." Id. at *23, citing Fullilove v Klutznick, 448 U.S. 448, 513 (1980).

The Communications Act of 1934 has no such incentive scheme. As amended on August 10, 1993, the Act gives the FCC express authority to employ competitive bidding procedures to select among mutually exclusive applicants for certain initial licenses. The rules adopted by the FCC in the Fifth Order and Report (59 FR *63210) established block licenses to insulate smaller applicants from bidding against very large, well-financed entities. The FCC also "supplemented [their] entrepreneurs' block regulations with other special provisions designed to offer meaningful opportunities for designated entity participation in broadband PCS." Id. at *63211. These special provisions included the availability of bidding credits and installment payment options that have demonstrated historic difficulties in accessing capital, the extension of tax certificate benefits to minority and women applicants to promote participation, the adoption of attribution rules, and the reduction of the up-front payment required of bidders in the

entrepreneurs' block. Id. In addition, "entrepreneurs who fall within one of the four statutory 'designated entity' categories (i.e. small business, rural telephone companies, and businesses owned by members of minority groups and/or women) are eligible for additional benefits to enable them to acquire broadband PCS licenses." Id. at *63212.

Before the amendment to the Communications Act, few small businesses, let alone businesses owned by minorities, would qualify under the FCC guidelines to bid for broadband PCS licenses. Congress mandated that the FCC:

> [P]romote economic opportunity and competition and ensur[e] that new and innovative technologies are readily accessible to the American people by avoiding excessive concentration of licenses and by disseminating licenses among a wide variety of applicants, including small business, rural telephone companies, and business owned by minority groups and women.

47 U.S.C. 309(j)(3)(B). The FCC interpreted this language in the amendment to "ensure that licenses are widely dispersed among a variety of licensees, so long as [the FCC], among other statutory objectives, ensures that designated entities are given the opportunity to participate in the provision of broadband PCS." 59 FR at *63212. Thus, the Communications Act does not contain a race-based referencing mandate. The Act merely provides that one of the groups that benefit from the dissemination of licenses among a wide variety of applicants be minority-owned businesses.

In order to allow minority-owned businesses the opportunity to participate in the PCS market, the FCC created "entrepreneurs blocks," which comprise one-third of the total amount of the licensed broadband PCS spectrum. The special provisions created by the FCC to ease the burden on designated entities to qualify for bidding do not contain any quotas or percentages. The entrepreneurs blocks need not contain a certain number of minority businesses, nor do the

minority businesses receive any special consideration in the bidding process. The FCC has designed a system of licensing that will more widely disperse the available broadband PCS licenses, while still avoiding any quotas or referencing mandates when it comes to the issuing of those licenses. The Communications Act is not a race-based referencing statute, and is therefore not affected by the Supreme Court's holding in Adarand.

3. **The Communications Act would survive strict scrutiny**

Even if the Communications Act were deemed a race-based referencing statute, the provisions of the Act and the FCC's Rules and Regulations interpreting the Act are narrowly tailored to further the government's compelling interest in "promoting economic opportunity and competition and ensuring that new and innovative technologies are readily accessible to the American people by avoiding excessive concentration of licenses." 59 FR at *63212. The passage of the amendment to the Communications Act in question was an attempt by Congress to prevent an oligopoly on broadband PCS licenses. The FCC interpreted this mandate to provide access to licenses for smaller businesses by creating "entrepreneurs blocks" specifically for small businesses. These blocks are open to parties other than designated entities to apply for or invest in. As the FCC states, "We believe that term 'including' in Section 309(j)(3)(B) of the Communications Act is a term of enlargement, not limitation, intended to convey that other entities are includable together with, rather than excluded from the categories of designated entities so long as legislative intent is satisfied." Id.

The FCC also limited the special provisions to the entrepreneurs' blocks, rejecting a proposal to make the special provisions available to all designated entities bidding on all of the broadband PCS frequency blocks. Id. at *63213. The FCC felt that the special provisions were

"*narrowly tailored* to meet Congress' objective of ensuring that designated entities have the opportunity to participate in broadband PCS." Id. (emphasize added).

The Supreme Court stated in Adarand that requiring strict scrutiny is the best way to ensure that courts will consistently give racial classifications that kind of detailed examination both as to ends and as to means. 95 WL 347345 at *21. The end to be served by the racial classification, that of more diversified participation in the provision of broadband PCS, is served in the Communications Act by the entrepreneurs' block and the special provisions attached to it. However, this block is open to all entrepreneurs, not just minorities, that successfully bid for a license. Not only that, but the FCC special provisions were created to encourage participation by women-owned businesses, rural telephone companies, and small businesses as well as minority owned-businesses.

The means by which the FCC has implemented Congress's mandate to diversify licensing is extremely narrowly tailored. The applicant pool for licenses has been broadened, without setting aside quotas for minorities or women to obtain those licenses. The only quota present is the FCC Regulation that one third of broadband PCS licenses will now go to entrepreneurs. This type of narrow tailoring is exactly the type that the Supreme Court had in mind when it stated:

> strict scrutiny does take 'relevant differences' into account - indeed, that is its fundamental purpose. The point of carefully examining the interest asserted by the government in support of a racial classification, and the evidence offered to show that the classification is needed, is precisely to distinguish legitimate from illegitimate uses of race in governmental decision making.

Adarand, 95 WL 347345 at *16. Congress deemed that a racial classification was needed when it listed minority-owned businesses as one of the several small business entities that should be encouraged to participate in the broadband PCS market. Congress did not mandate any

referencing for these minority-owned businesses, and the FCC did not supply any. The FCC rules regarding entrepreneurs's blocks are narrowly tailored to diversify broadband PCS license holders. Therefore, the Communications Act and the FCC Rules and Regulations interpreting it would survive strict scrutiny.